

BRB Nos. 01-0669
and 01-0688

JAMES RIGGI)	
)	
Claimant-Respondent)	DATE ISSUED: <u>May 14, 2002</u>
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeals of the Supplemental Decision and Order Granting Attorney's Fees of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor, and the Attorney Fee Determinations of John J. McTaggart, District Director, United States Department of Labor.

Stephen P. Moschetta (Joseph P. Moschetta and Associates), Washington, Pennsylvania, for claimant.

Michael W. Zimecki (Strassburger McKenna Gutnick & Potter), Pittsburgh, Pennsylvania, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney's Fees (99-LHC-2740; 99-LHC-2741) of Administrative Law Judge Gerald M. Tierney and the Attorney Fee Determinations (03-26943) of District Director John J. McTaggart rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a dockman, suffered a series of injuries during the course of his employment with employer. Specifically, on April 30, 1997, claimant injured his back, groin and right lower extremity and was unable to work from May 1 to May 16, 1997. He returned to work but reinjured

his back within a month and was unable to work from June 16 to July 16, 1997. An exacerbation of symptoms following his return to work forced claimant to remain off work yet again from July 24 to September 2, 1997. On December 13, 1997, claimant suffered a third injury at work which resulted in his leaving work permanently. Employer voluntarily paid claimant temporary total disability compensation during the relevant periods. 33 U.S.C. §908(b).

Before the administrative law judge, the parties contested the date of maximum medical improvement, and employer sought relief under Section 8(f) of the Act, 33 U.S.C. §908(f). In his Decision and Order, the administrative law judge found the date of maximum medical improvement to be August 17, 1999, and he awarded claimant compensation for permanent total disability from that date forward. Additionally, the administrative law judge found employer entitled to Section 8(f) relief based upon the combined effects of claimant's latest injuries and the residuals from his first work accident which occurred August 2, 1994. 33 U.S.C. §908(a), (f).

Subsequently, claimant's attorney filed fee petitions before both the district director and the administrative law judge for services rendered before those two officials. Before the district director, claimant sought an attorney's fee of \$3,735, representing 12.3 hours of services rendered at \$200 per hour, and 6.5 hours of services rendered at \$150 per hour. Before the administrative law judge, claimant sought an attorney's fee of \$7,827.45, representing 23.95 hours of services rendered at the rate of \$200 per hour for lead counsel, and 18.8 hours of services rendered at \$150 per hour for junior counsel, plus expenses of \$217.45. Employer filed objections to both fee petitions, arguing that it was not liable for counsel's fee since it had voluntarily paid compensation in this case and that both the hourly rates and hours billed on specific dates were excessive.

In his Supplemental Decision and Order, the administrative law judge initially determined that, as claimant was successful in obtaining additional compensation, employer is liable for his counsel's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). The administrative law judge then awarded, without discussion, the requested fee plus an additional \$1,385, representing .4 hours at \$200 per hour and 8.7 hours at \$150 per hour in services rendered by counsel in responding to employer's objections to the fee petition. Thereafter, also without addressing employer's objections, the district director awarded the fee requested by counsel for work performed at the district director level.

Employer now appeals, challenging the administrative law judge's and district director's fee awards.¹ Claimant responds, urging affirmance of both awards.

It is well-established that the official awarding a fee has broad discretion in his award of an attorney's fee and that the party challenging the reasonableness of an attorney's fee bears the burden of showing that the award is contrary to law or the determinations are arbitrary, capricious, or an

¹By Order dated July 20, 2001, employer's appeal of the administrative law judge's Supplemental Decision and Order, BRB No. 01-0669, and its appeal of the district director's Attorney Fee Determination, BRB No. 01-0688, were consolidated.

abuse of his discretion. *See generally Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988). In this regard, the official awarding a fee must review the fee petition and determine whether the fee requested is reasonably commensurate with the necessary work done, taking into account the quality of the representation, the complexity of the legal issues involved and the amount of benefits awarded. 20 C.F.R. §702.132; *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001).

On appeal, employer initially asserts that it is not liable for claimant's attorney's fees because employer's "voluntary payment of a few outstanding [medical] bills" does not constitute success achieved by counsel.² *See* Brief at 5-6; 33 U.S.C. §928(b). In making his award of an attorney's fee, the administrative law judge thoroughly addressed employer's argument that it is not liable for a fee.³ Based upon claimant's reply to this objection, the administrative law judge found that additional benefits, specifically the payment of the medical services of Dr. Zubechevich, were obtained and paid as a result of counsel's efforts and that, therefore, there had been a successful prosecution entitling claimant to a fee award payable by employer pursuant to 33 U.S.C. §928(b). Moreover, as the administrative law judge found, there were several issues in controversy until shortly before the hearing was to be held, other than employer's entitlement to Section 8(f) relief, including timely notice, extent of disability and claimant's average weekly wage.⁴ Employer cannot escape liability for claimant's attorney's fees if it has only agreed to a resolution of issues at the last moment. *See Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). Thus, as employer's entitlement to Section 8(f) relief was not the only issue in contention, claimant's counsel is entitled to a fee payable by employer. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984). Accordingly, we affirm the administrative law judge's and district director's findings that employer is liable for claimant's attorney's fee pursuant to Section 28 of the Act.

With regard to the amount of the fee awards, however, we must remand this case because the administrative law judge and district director summarily awarded all hours and the hourly rate sought by claimant's counsel without discussion of the regulatory criteria and employer's specific

²Under Section 28(b), in general, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee only if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b).

³In his subsequent award of a fee to claimant's counsel, the district director, without discussion, also found employer liable for claimant's counsel's fee.

⁴Thus, the only issue was not, as employer alleges, its entitlement to relief under Section 8(f). In addition to the stipulations entered shortly before trial, the date of maximum medical improvement remained in controversy at the hearing for the administrative law judge to resolve. *See* Decision and Order-Awarding Benefits and Granting Section 8(f) Relief.

objections. Before both the district director and the administrative law judge, employer raised objections to the hourly rate as well as to specific hours requested by claimant's counsel. Employer also contended that certain specific charges should not be allowed as they pertained to services addressing employer's request for relief under Section 8(f) of the Act. Finally, employer argued that the hourly rates were excessive and neither reasonable nor customary within the geographic area in which they arose.

In awarding the entire fee requested by claimant's counsel in this case, the administrative law judge did not discuss the objections raised by employer, but summarily awarded counsel's full requested fee. The district director similarly awarded counsel his entire requested fee without addressing the specific objections raised by employer.⁵ As neither the administrative law judge nor the district director discussed employer's objections to the fee petitions submitted by claimant's counsel, we must remand this case for them to do so. On remand, the administrative law judge and the district director must consider claimant's counsel's fee petitions and employer's objections; while their fee orders are not required to discuss in detail each individual entry and objection, they must provide an analysis which comports with the regulatory criteria, 20 C.F.R. §702.132, and an adequate rationale for their respective determinations regarding the reasonable hours and hourly rate. *See Steevens v. Umpqua River Navigation Co.*, 35 BRBS 129 (2001).

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney's Fees and the district director's Attorney Fee Determination are affirmed insofar as they hold employer liable for claimant's counsel's fee. The findings regarding the hourly rate and compensable hours are vacated, and the fee awards are remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

⁵The district director's statement that he "specifically adapts [sic] herein the same conclusions regarding the hourly rates charged by claimant's counsel for practice in this program" is specious given the fact that the administrative law judge awarded the rates sought by claimant's counsel without discussion.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge